# UNITED STATES OF AMERICA BEFORE THE NATIONAL LABOR RELATIONS BOARD DIVISION OF JUDGES SAN FRANCISCO BRANCH OFFICE

CAPITAL MEDICAL CENTER

and Case 19–CA–105724

**UFCW LOCAL 21** 

Elizabeth Devleming, Esq., for the General Counsel. Glenn Bunting, Esq. and Henry Warnock, Esq., for the Respondent. Brittany Pitcher, Esq., for the Charging Party.

## **DECISION**

## STATEMENT OF THE CASE

ELEANOR LAWS, Administrative Law Judge. This case was tried in Seattle, Washington, on March 17–18, 2014. The United Food and Commercial Workers Local 21 (Local 21 or Union) filed the charge on May 22, 2013<sup>1</sup> and the General Counsel issued the complaint on December 20.

The complaint alleges that on May 20, 2013, the Respondent violated Section 8(a)(1) of the National Labor Relations Act (the Act) by threatening employees who were engaged in stationary picketing and handbilling with discipline and arrest, by summoning police to the Hospital, and by denying its off-duty employees access to parking lots, gates, and other outside nonworking areas to engage in activities protected by Section 7 of the Act. Capital Medical Center (the Respondent or Hospital) filed a timely answer denying all material allegations.

The parties filed a joint motion for partial stipulation of facts which I granted and admitted into the hearing record as Joint Exhibit 1 (Jt. Exh.).<sup>2</sup>

<sup>&</sup>lt;sup>1</sup> All dates are in 2013 unless otherwise indicated.

<sup>&</sup>lt;sup>2</sup> Abbreviations used in this decision are as follows: "Tr." for transcript; "R Exh." for Respondent's exhibit; "GC Exh." for General Counsel's exhibit; "Jt. Exh." for joint exhibit; "GC Br." for the General Counsel's brief; and "R Br." for the Respondents' brief. Although I have included several citations to the record to highlight particular testimony or exhibits, I emphasize that my findings and conclusions are based not solely on the evidence specifically cited, but rather are based my review and consideration of the entire record.

On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed by the General Counsel, the Union and the Respondent, I make the following

FINDINGS OF FACT

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#### I JURISDICTION

The Respondent, a Washington corporation with an office and place of business in Olympia, Washington, is engaged in the business of providing patient and health care services and operating an acute care hospital. At all relevant times, the Respondent derived gross revenues in excess of \$250,000, and purchased and received at its Washington facilities goods valued in excess of \$50,000 from points outside the State of Washington. The Respondent admits, and I find, that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and that the Union is a labor organization within the meaning of Section 2(5) of the Act.

# II. ALLEGED UNFAIR LABOR PRACTICES

This case involves whether or not informational picketing activities occurring over a roughly 2–hour period on May 20, 3013, were protected by the Act.

The Respondent operates an acute care hospital. The Union has been the certified collective-bargaining representative of a mixed unit of the Hospital's technical employees for about 14 years.

Jenny Reed is the Union's membership action director for healthcare. During the relevant time period, she was a representative for Local 21 assigned to the Hospital. The Hospital and the Union began bargaining for a successor contract in September 2012, and as of May 2013, there was not yet a collective-bargaining agreement (CBA) in place. Glenn Bunting, a private attorney who represents the Hospital for labor relations matters, was the lead negotiator for the Hospital. Heather Morotti, the Hospital's director of human resources, also served on the negotiating committee. The Union's lead negotiator was Janet Parks.

Gina Arland, an x-ray technician and Local 21 steward, was a member of the negotiating committee. She knew the employees were becoming frustrated about the state of the negotiations. As a response, the Union and some of the employees planned an informational picket for May 20. That date was selected to directly precede an upcoming bargaining session scheduled for May 21–22. The goal of the picket was to educate the public and encourage the Hospital to discuss some key issues and settle on a contract. On May 9, the Union, by way of a letter from Parks, provided the Respondent with notice of its intent to engage in picketing and handbilling on May 20.<sup>3</sup> (Jt. Exh. 5.)

On May 16, Morotti, Bunting, and Dean Rutledge, the director of engineering with oversight of security, spoke with Lieutenant Holmes from the Olympia Police Department to

<sup>&</sup>lt;sup>3</sup> This notice is required by Sec. 8(g) of the Act.

make the police aware of the pickets.<sup>4</sup> Holmes provided Bunting with a copy of Olympia Municipal Code 9.68.020, a local ordinance regarding trespass and interference at health care facilities.

Bunting and Morotti also spoke with Parks, who told him Reed was in charge of the pickets.<sup>5</sup> (GC Exh. 9.) The purpose of the discussions with Holmes and Parks, according to Bunting, was to make sure channels of communication were open and clear and to try to avoid misunderstandings. The Hospital also arranged to have an additional security guard present for the picketing. Security was instructed security to ensure any picketing remained outside the 10 Hospital's property lines.<sup>6</sup>

On May 17, Arland provided Morotti with a picture of Reed and her contact information. (Jt. Exh. 6.)

15 During the evening of May 19, Reed and some other organizers and members put together picket signs and went over general rules about the picket. They discussed that because there were patients and other customers coming to the Hospital the Union wanted to keep their approach positive. Employees were instructed to introduce themselves and, if they were leafleting, hand leaflets to the people walking by them. With regard to leafleting, the organizers 20 instructed members to stand to the sides of the doors and not to block entrances. They also discussed avoiding emergency entrances and any areas that could impede patient care. They decided to distribute leaflets at two entrances: the main lobby entrance, which is primarily for family members of patients, reps, and employees; and the physician's pavilion entrance, which is used primarily by people attending appointments in the physicians' offices and employees. Reed did not instruct the picketers to chant, yell, sing, or march back and forth. 25

Picket signs identified the picketers as "Capital Medical Center Workers" on the top, and on the bottom, "Informational Picket, UFCW 21." In the middle were phrases such as: "Fair Wages," "Fair Contract Now," or "Respect Our Care." The signs were standard-size, about two feet by three feet. (Jt. Exh. 8; GC Exhs. 2-8.) The leaflets said:

# **OUR PATIENTS MATTER**

We are the health care providers who care for patients at Capital Medical Center.

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<sup>&</sup>lt;sup>4</sup> The General Counsel requests that I draw an adverse inference based on Rutledge's failure to testify. (GC Br. 40, fn. 27.) I decline to grant this request because my decision is based on what occurred, which is a matter of record, and I cannot see how his testimony, favorable or unfavorable, would impact my decision in any way.

<sup>&</sup>lt;sup>5</sup> Bunting also testified that Parks told him picketing would be confined to the sidewalk. Parks testified, "I recall him saying that we couldn't picket on the property. I told him we were on the sidewalk." (Tr. 292.) She claimed she did not make any assurances. Ambiguities aside, what Parks and Bunting may have said to each other on the phone does not impact my decision.

<sup>&</sup>lt;sup>6</sup> The General Counsel requests that I draw an adverse inference based on the failure of any of the security guards to testify. (GC Br. 40, fn. 26.) Because Arland's testimony about her interactions with security are unrefuted, and she is an otherwise credible witness, there is no dispute of fact warranting an inference.

Right now, we are in contract negotiations with our employer, but wanted to let you know that we are having difficulty reaching a compromise. Management continues to refuse to fix problems that leave us short-staffed and cause us to miss our breaks and meals. In addition, they have been unwilling to support fair wage increases.

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We have already voted down a prior offer from management and are back in negotiations.

# THANK YOU

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Supporting hospital workers means standing up for the middle class values that respect the dignity of hard work. This includes fair wages, fair benefits, and dependable hours.

(Jt. Exh. 7.)

The informational picket took place on May 20 from 6 a.m. to 6 p.m. Reed arrived at 5:45 a.m. and parked near the driveway to the Respondent's premises where she met with the employee picketers. The picketers gathered on the sidewalk adjacent to the driveway and this location served as meeting point throughout the day. At 6 p.m., Reed went over the logistics of the picket and started dispersing around 20–25 employee picketers to different locations. (Jt. Exh. 9.)

Arland participated in the picket from 6 a.m. until she was called to work her shift at 2p.m. During that time period, there were two employees handing out leaflets at the side of the front lobby entrance, two employees doing the same beside of the physician's pavilion entrance, and anywhere from 15 to 30 employees out on sidewalk bordering the Hospital carrying picket signs. The employees on the sidewalk used a bullhorn and did some chants. Some employees held signs that said something like "honk for fair wages," so some cars were honking as they drove by.

The number of participants was highest between about 3:30 and 4:15 p.m.. At that point 50–60 employees were picketing and leafleting.

Arland's shift ended at 4 p.m. and, after checking in with Reed, she and fellow employee Derek Durfey went to the main lobby entrance with picket signs. Around this same time, Allison Zassenhaus, who at the time was an employee and Local 21 steward, was leafleting near the pavilion entrance. Arland recalled she and Durfey were the only two picketers at the main lobby entrance. Bunting and Morotti recalled seeing more employees with picket signs at the main lobby entrance. At some point, an individual other than Arland, Durfey, or Zassenhaus was near the main lobby entrance with a picket sign, though not necessarily at the same time. (GC Exh. 6.)

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Arland stood to the right of the entrance and Durfey stood to her right, farther away from the entrance, about 10–12 feet from it. Durfey carried two picket signs. Arland tried to remain in line with the outside pillars alongside the entryway. The only times she went past the pillars was when she was briefly engaging a patron to hand him/her a leaflet. Arland initially attempted to hand out leaflets while holding the picket sign, but found it too cumbersome so she ultimately ceased leafleting and just held the picket sign. Durfey did not speak with any patrons.

<sup>&</sup>lt;sup>7</sup> Zassenhaus stopped working for the Respondent in June 2013.

Morotti received a report that employees were picketing adjacent to the front lobby entrance at around 4p.m. According to Bunting, they saw 3–4 picketers with signs at the front lobby entrance and at the pavilion entrance. Before Arland or Durfey approached any patrons, three security guards came to the entryway. Bruce Hillard, the security manager, approached Arland and told her she was welcome to stay at the doorway with leaflets, but she was not permitted to stand on the Hospital property with her picket sign. He politely asked her to leave and she politely declined. This scenario repeated itself every 15–20 minutes for the next hour or so.

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Bunting and Morotti followed behind Hillard the third or fourth time he approached the picketers. Bunting told Arland she could be on the property with pamphlets but she could not be out at the entrance with her sign.

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Durfey went down to the sidewalk to get Reed. Accompanied by fellow Local 21 Representative Cathy MacPhail, Reed went up to the main entrance. Reed expressed her belief to Bunting that the employees had the right to picket by the entrance. After a brief conversation outside, Bunting asked Reed and MacPhail to come inside to Morotti's office. While there, Bunting told Reed and MacPhail they needed the employees to leave, and said they could face discipline if they remained.

Reed attempted to clarify whether there would be repercussions for the employees engaging in concerted activity, so she asked him, repeatedly, "Yes or no?" Bunting responded by using hand gestures similar to Reed's and repeating to her, "Yes or no", which Reed perceived as mocking. Reed said the union attorney, James McGuinness, had told her the employees had the right to picket outside the hospital doors, and Bunting asked her to get McGuinness on the phone. Reed responded that she did not intend to call McGuinness, but Bunting was free to call him if he wanted. At this point, Reed and MacPhail left.

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Bunting called McGuinness and expressed his view that the picketers were not entitled to picket at the entryways and the Hospital was entitled to exercise its property rights. He did not report any disruption, just that they were enforcing property rights. Bunting recalled they disagreed on the law regarding where the employees could picket and he asked if McGuinness would call the Union so they could attempt to resolve the matter. He conveyed that if they could not resolve the situation, the Hospital's options were to discipline the employees or call law enforcement.

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After the phone call, Morotti consulted with the Hospital's CEO and they decided they would not issue discipline, but would call the police at 5p.m. if the picketers were still present near the entryways.

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Following the meeting with Bunting and Morotti, Reed and MacPhail checked in on the picketers. Reed informed Arland that Bunting said she could be accountable for what she was doing.

<sup>&</sup>lt;sup>8</sup> McGuinness was not specifically identified as the attorney until the end of their conversation.

Shortly thereafter, Bunting and Morotti came out again and Bunting told Arland she should not be there. She expressed her belief that she had a right to be there. Arland could not recall the precise words, but recalled being told she, not the Union, could get in a lot of trouble. Reed came back and conversed with Bunting. Reed asked Arland if she wanted to remain where she was, and she replied that she did. Durfey and Zassenhaus heard Bunting mention calling the police. Arland told Durfey he should leave because she was concerned about him getting in trouble. Durfey was nervous, so he returned to the sidewalk. At that point, Zassenhaus took his picket sign.

Bunting and Morotti went back inside. Reed went back to the sidewalk area and called Pam Blauman, the Union's membership action director. Shortly thereafter, at 4:59 p.m., James Sen, a security officer, called the Olympia Police Department. (GC Exh. 8.)

At 5:11 p.m., Olympia Police Department Patrol Sergeant Dan Smith arrived at the 15 Hospital. Upon seeing him, Arland called Reed, who came back to the main lobby entryway. Bunting and Morotti came out and told Smith they wanted the picketers removed from the Hospital's premises. Smith also spoke to Reed, who told him they were almost done picketing for the day and asked if he was going to arrest anyone. Smith went back and talked to Bunting and Morotti, and told them he could not force the picketers to leave because they were not being 20 disruptive and they were not blocking doors or preventing people from entering the Hospital. He encouraged the parties attempt to come to a compromise. The time for the picket to end was nearing, so the picketers started packing and left, which resolved the situation. Smith left the Hospital at 5:49 p.m.

Arland recalled there was not much traffic at the main lobby entrance when she was there with her picket sign. Durfey did not talk to anyone entering or exiting the Hospital. Zassenhaus talked to about 10–15 people when she was handbilling at the pavilion entrance. Less than five individuals entered or exited the Hospital during the time she carried her picket sign. There were no negative or confrontational interactions between the picketers and anyone entering or exiting 30 the Hospital entrances.

# III. DECISION AND ANALYSIS

# A. Alleged Denial of Access to Publicize Dispute

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The complaint, at paragraph 8(b), alleges that the Respondent violated Section 8(a)(1) of the Act on May 20, 2013, by denying off-duty employees access to parking lots, gates, and other outside nonworking areas for the purpose of publicizing their dispute by engaging in Section 7 activity that did not constitute picketing. The evidence demonstrates that the only activity the Respondent sought to exclude on its property was picketing. Handbilling and leafleting on the Hospital's property was permitted on May 20, and had been permitted on previous occasions. 10 Accordingly, I recommend dismissal of this complaint allegation.

<sup>&</sup>lt;sup>9</sup> At the time of the hearing, Blauman had retired.

<sup>&</sup>lt;sup>10</sup> The Hospital maintains a solicitation policy that prohibits flyers or other forms of mass distribution and prohibits solicitation of (which includes distribution to) members of the public. The policy was not alleged to be unlawful in the complaint, and none of the parties reference it in their respective closing briefs.

Paragraph 8(a) of the complaint alleges that the Respondent violated Section 8(a)(1) of the Act by denying off-duty employees access to parking lots, gates, and other outside nonworking areas for the purpose of publicizing their dispute by picketing or distributing materials. As set forth directly above, distribution of leaflets was permitted in the past and on May 20. Accordingly I recommend dismissal of this part of the complaint allegation.

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The remaining allegation with regard to access is whether the Respondent violated the Act by prohibiting employees from picketing near the main lobby and pavilion entrances of the Hospital.

Under Section 8(a)(1), it is an unfair labor practice for an employer to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in Section 7 of the Act. The rights guaranteed in Section 7 include the right "to form, join or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection . ." The Board's longstanding test to determine if there has been a violation of Section 8(a)(1) of the Act is whether the employer engaged in conduct which might reasonably tend to interfere with the free exercise of employee rights under Section 7 of the Act. *American Freightways Co.*, 124 NLRB 146 (1959). Further, "It is well settled that the test of interference, restraint, and coercion under Section 8(a)(1) of the Act does not turn on the employer's motive or on whether the coercion succeeded or failed." *American Tissue Corp.*, 336 NLRB 435, 441 (2001) (citing *NLRB v. Illinois Tool Works*, 153 F.2d 811, 814 (7th Cir. 1946)).

The parties cite to two different lines of cases to support their respective positions. The General Counsel and the Union rely on *Tri-County Medical Center*, 222 NLRB 1089 (1976), where the Board held that an employer's rule barring off-duty employees access to their employer's facility is valid only if it: (1) limits access solely to the interior of the facility, (2) is clearly disseminated to the employees, and (3) applies to off-duty access for all purposes, not just for union activity.

The Respondent cites to Supreme Court precedent for the proposition that the Board's task is to seek a proper accommodation for conflicts involving Section 7 rights and property rights, and to balance these competing interests "with as little destruction of one as is consistent with the other." *NLRB v. Babcock & Wicox Co.*, 351 U.S. 105, 1112 (1956); *Hudgens v. NLRB*, 424 U.S. 507, 521 (1976). More specifically, the Respondent relies on the Board's decision in *Jean Country*, 291 NLRB 11, 14 (1988), <sup>11</sup> to assert that the following test applies in the instant case:

[I]n all access cases our essential concern will be the degree of impairment of the Section 7 right if access should be denied, as it balances against the degree of impairment of the private property right if access should be granted. We view the consideration of the availability of reasonably effective alternative means as especially significant in this balancing process.

<sup>&</sup>lt;sup>11</sup> The Respondent also cites to a non precedential administrative law judge (ALJ) decision, *In re Fuji Foods US, Inc.*, Case No. 27–CA–17596, 2002 NLRB LEXIS 313 (2002). That case involved access rights of employees on strike. Even if it had precedential value, it would not apply here.

For the following reasons, I decline to apply either *Tri-County Medical Center* or *Jean Country*.

The *Jean Country* balancing approach, as applied to non-employees, was repudiated by the Supreme Court in *Lechmere*, *Inc.* v. *NLRB*, 502 U.S. 527 (1988). *Lechmere* did not concern access for off-duty employees, so the Court, not surprisingly, was silent on the matter.

Following *Lechmere*, the Board has declined to apply the *Jean Country* test to cases involving off-duty employee access to the work premises. In *Nashville Plastic Products*, 313 NLRB 462, 463 (1993), the Board stated, "*Lechmere* itself emphasized the critical distinction between employees and nonemployees as established in *NLRB v. Babcock & Wilcox*,<sup>12</sup> and, *a fortiori*, the rule enunciated in *Lechmere* does not apply to employees." (Fn. omitted.) The Board also squarely rejected the employer's argument that off-duty employees should be treated like non-employee union organizers for purposes of access. In the words of the Court of Appeals for the Sixth Circuit, in a case involving off-duty employees' distribution of union literature, "The championed balancing test of *Jean Country* is no more." *Timken Co. v. NLRB*, 29 Fed.Appx. 266, 267 (6th Cir. 2002).

Accordingly, I find the test set forth in *Jean Country* does not apply to the instant case. In addition to its repudiation by subsequent caselaw, another reason I decline to apply *Jean Country* is that the instant case does not involve a no-access rule or policy. It is undisputed that off-duty employees were permitted to be on the Hospital's premises both on May 20 and before, so long as they did not carry picket signs. Likewise, no evidence was presented that off-duty employees were otherwise prohibited from coming to the Hospital. It is not access to the Hospital that is central to this case, but rather the participants' pursuit of the Section 7 activity. For this same reason, the General Counsel and Union's reliance on *Tri-County Medical Center*, 222 NLRB 1089 (1976), is misplaced. See *Santa Fe Hotel & Casino*, 331 NLRB 723, 729 (2000).

I find instead that the proper legal authority is the Supreme Court's decision in *Republic Aviation Corp. v. NLRB*, 324 U.S. 793 (1945), which governs employee rights to engage in Section 7 activity on an employer's property, and upon which the General Counsel relies in tandem with *Tri-County Medical Center*. Pursuant to *Republic Aviation*, employers may not bar employees who are not on working time from: (1) engaging in solicitation, or (2) distributing literature in nonworking areas of its property, unless such a bar is necessary to maintain discipline and production.

In *Town & Country Supermarkets*, 340 NLRB 1410, 1413–1414 (2004), the Board applied *Republic Aviation* to find that the employer violated the Act by calling the police, threatening arrest, and causing the arrest of employees who were picketing and handbilling at the front entrances of its stores. The Board contrasted nonemployee organizers, who may be considered trespassers, with off-duty employees, stating:

The critical distinction is that employees are not strangers to the employer's property, but are already rightfully on the employer's property pursuant to their employment

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<sup>&</sup>lt;sup>12</sup> 351 U.S. 105 (1956).

relationship, thus implicating the employer's management interests rather than its property interest. . . . In sum, under *Republic Aviation*, supra, off-duty employees may engage in protected solicitation and distribution in nonwork areas of the employer's property.

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(Citations omitted.) The Board in *Town & Country* did not distinguish between handbilling and picketing, finding the employer's prohibition of both activities on its property unlawful in the absence of a justification based on its need to maintain order or discipline.

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The fact that the picketing at issue here was informational rather than organizational is of no consequence. As the Board stated in *NCR Corp.*, 313 NLRB 574, 576 (1993), "Employees have a statutorily protected right to solicit sympathy, if not support, from the general public, customers, supervisors, or members of other labor organizations." See also *Eastex, Inc. v. NLRB*, 437 U.S. 556 (1978); *Stanford Hospital & Clinics v. NLRB*, 325 F.3d 334, 343 (D.C. Cir. 2003); *Providence Hospital*, 285 NLRB 320, 322 (1987)(economic protest against employer to

15 Providence Hospital, 285 NLRB 320, 322 (1987)(economic protest against employer to publicize bargaining position in a contract negotiation dispute is primary activity involving a core Section 7 right); Santa Fe Hotel & Casino, supra at 723.; New York New York LLC (NYNY), 356 NLRB No. 119 (2011).

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The Respondent asserts, as an affirmative defense, that its actions were in accordance with state law and a local ordinance. Section 9A.52.080 of the Revised Code of Washington (RCW) states, in relevant part, "A person is guilty of criminal trespass in the second degree if he or she knowingly enters or remains unlawfully in or upon premises of another. . . ." Olympia Municipal Code 9.68.020, entitled, "Interference with Health Care Facilities," states:

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It is unlawful for a person except as otherwise protected by state or federal law, alone or in concert with others, to willfully or recklessly interfere with access to or from a health care facility or willfully or recklessly disrupt the normal functioning of such facility by:

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A. Physically obstructing or impeding the free passage of a person seeking to enter or depart from the facility or the common areas of the real property upon which the property is located;

B. Making noise that unreasonably disrupts the peace within the facility;

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C. Trespassing on the facility or the common areas of the real property upon which the facility is located;  $\dots$ 

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(R. Exh. 1.) As set forth above, the off-duty employees were not trespassers, so any defense based on state trespass law fails. Moreover, the local ordinance limits its own application by stating, "except as otherwise protected by state or federal law . . . ." Here, the actions at issue were protected by the Act. In any event, there is no evidence any of the picketers willfully or recklessly disrupted the normal functioning of the Hospital.

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Citing to *Hillhaven Highland House*, 336 NLRB 646, 649 (2001), the Respondent contends that the conduct of an off-duty employee can change his status from an invitee to a trespasser. The Board, however, was discussing the status of offsite employees in *Hillhaven* 

*Highland House*, not employees who worked onsite, as here. Moreover, that case involved enforcement of a rule barring offsite employees from access to facilities other than the jobsite where they worked. There is no such general access rule at issue in this case.

The Respondent also relies on *NYNY*, supra, which involved handbilling by employees of Ark, a food service provider that contracted with the Respondent, a hotel. The Respondent's brief cites to a portion of the *NYNY* decision, which states:

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[I]t also seems clear that, purely from the perspective of state property law, the Ark employees were trespassers at the moment they began to distribute handbills. Whatever their status as NYNY's invitees at other times and for other purposes, there is no suggestion that the offduty Ark employees had an invitation from NYNY that privileged them to distribute handbills to the public in the locations involved here.

Slip op. at 13. This portion of the decision, however, concerned the hotel owners' property rights when Ark employees distributed handbills in areas of the hotel outside of Ark's leasehold. The Board came to a rather different conclusion when analyzing whether employees could do the same at entrances to the hotel and a restaurant Ark serviced. The cited portion of *NYNY* is therefore is inapplicable here, as the Hospital owned the property where the disputed activity occurred.

The case that weighs most strongly in the Respondent's favor is *Providence Hospital*, supra. In *Providence Hospital*, off-duty hospital employees frustrated with the state of contract negotiations engaged in informational picketing and handbilling on public property adjacent to the hospital and at the hospital's entryway. The Board relied on *Fairmont Hotel*, 282 NLRB 139 (1986), and applied its then-current test, as follows:

If the property owner's claim is a strong one, while the Section 7 rights at issue is clearly a less compelling one, the property right will prevail. If the property claim is a tenuous one, and the Section 7 right is clearly more compelling, then the Section 7 right will prevail. Only in those cases where the respective claims are relatively equal in strength will effective alternative means of communication become determinative.

This test was short-lived, as *Fairmont Hotel* was overruled less than 2 years later by *Jean Country*, supra, to the extent that it held the test required consideration of alternative means of communication only if property interests and Section 7 rights were relatively equal. As discussed above, *Jean Country* was subsequently overruled by *Lechmere*, supra, at least as to the rights of nonemployees.

Though *Providence Hospital* has not been expressly overruled, it turned on application of precedent that has since been overruled—*Fairmont Hotel*.<sup>13</sup> The Board, with guidance from the Supreme Court, has since refined its caselaw, and though the lines are at times blurred, there

<sup>&</sup>lt;sup>13</sup> I note also that *Fairmont Hotel* concerned handbilling activities of nonemployees, so it is unclear why the Board chose to apply it given that employees conducted the handbilling and picketing in *Providence Hospital*. This is particularly confounding, considering the Board did not endorse the ALJ's rationale that off-duty employees are analogous to nonemployees under *GTE Lenkurt, Inc.*, 204 NLRB 921 (1973), stating it agreed with the judge's decision, but only for the reasons set forth in its decision.

appear to be distinctions based on various permutations of three primary considerations: (1) the characteristics of the individuals engaging in the activity at issue, i.e., employee versus nonemployee; (2) the ownership of the property, i.e., ownership by the employer versus ownership by another entity; and (3) the nature of the rule or prohibition, i.e., a rule barring access to anyone other than employees who are on the clock versus a rule targeting certain activities on the work premises. The caselaw I have chosen to apply is guided by the facts that the individuals who engaged in the Section 7 activity at the Hospital on May 20 were employees, the disputed Section 7 activities took place on property the Hospital owned and controlled, and the prohibition targeted the specific Section 7 activity of carrying picket signs at the hospital's nonemergency entryways. *Providence Hospital*, which applied a now defunct test for nonemployees, appears to be an outlier in the wake of the caselaw that has since developed concerning off-duty employees who engage in Section 7 activity in nonworking areas of their own employer's property.

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In addition to relying on *Providence Hospital* to assert its property rights, the Respondent argues that case supports its contention that, because of the unique nature of the hospital setting, having picketers at the doorway creates undue stress for hospital patrons. Put in terms that conform to the precedent I believe is correct and applicable here, the Respondent contends that enforcement of a rule prohibiting picketing activity at the entryway to the hospital is tailored to legitimate business concerns regarding the impact of such activity on hospital patients and their families

Recognizing the need for hospitals to provide a tranquil atmosphere to carry out its primary function of patient care, the Supreme Court and the Board have recognized some special considerations when it comes to Section 7 activity in a hospital setting. *Beth Israel Hospital v. NLRB*, 437 U.S. 483, 500 (1978); *St. John's Hospital & School of Nursing, Inc.*, 222 NLRB 1150 (1976), enfd. in part 557 F.2d 1368 (10th Cir. 1997). As such, hospitals "may be warranted in prohibiting solicitation even on nonworking time in strictly patient care areas, such as the patients' rooms, operating rooms, and places where patients receive treatment, such as x-ray and therapy areas." *St. John's Hospital*, supra. As to other areas, a hospital may place prohibitions on employees who engage in Section 7 activities only if it proves the prohibition is needed to prevent patient disturbance or disruption of health care operations. Id.; *NLRB v. Baptist Hospital*, 442 U.S. 773, 781–787 (1979).

I find the Respondent has not met its burden of proof. The Respondent argues that it has an interest in ensuring "patients, along with their family members and loved ones, are not forced to negotiate their way through a picket line as they enter and exit the Hospital." (R Br. 20.) The Respondent contends:

By positioning picketers at the Main Entrances of the Hospital and causing patients and family members to walk (or to be pushed in a wheelchair) past those picketers patrolling at the doorways, the Union subjected these most vulnerable Hospital patrons to additional stress that was both undeserved, and unnecessary for the accomplishment of the Union's goals.

(R. Br. 20.) This contention does not amount to proof, however. The only evidence regarding any potential disruption caused by the picket is that Morotti heard one visitor stated that he usually did not cross picket lines, but that he had to in order to visit a patient. (Tr. 280.) There

was no testimony or other evidence regarding the impact, if any, on patients or hospital operations.

Moreover, the contention is slightly embellished, in that there was no evidence the picketers "patrolled" the doorways. In fact, the evidence shows the picketers stationed themselves outside the main pathway to the door, and only stepped into the entryway briefly when engaging a patron.<sup>14</sup> This is what had occurred previously when the employees handbilled. The difference had nothing to do with the employees' presence on the property, but rather was solely the fact they later carried picket signs.

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Relying on *Providence Hospital*, the Respondent asserts that the "presence of picketers on hospital property could well tend to disturb patients entering and leaving the hospital." 285 NLRB at 322. While this is certainly a possibility, the Respondent has failed to meet its burden of proof given the facts present here. The evidence is unrefuted that the hospital was not very busy between 4:00 and the time the picketing activity ceased shortly before 6:00 that day. Arland provided unrefuted testimony that traffic at the front door was very low. Zassenhaus recalled less than five employees entered or exited the Hospital when she held her picket sign. Under these circumstances, the Respondent has not met its burden of proof. *Beth Israel*, supra; *NLRB v. Southern Maryland Hospital Center*, 916 F.2d 932, 935 (4th Cir. 1990).

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The Respondent also asserts that Section 8(g) of the Act imposes different constraints on picketing, as opposed to handbilling, due to its coercive nature. 15 Citing to *Nurses CAN* (*City of Hope*), 315 NLRB 468, 470 (1994), the Respondent argues that picketing is restricted at health care institutions because it may disrupt patient care by causing a work stoppage. That case, however, involved picketing during an economic strike. The threat of work stoppage in the strike context certainly does not carry over to the informational picket as it was implemented here.

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Next, the Respondent avers that Section 8(b)(4) of the Act recognizes the inherently coercive nature of picketing. There is a wealth of caselaw regarding the coercive nature of secondary picketing pursuant to Section 8(b)(4), including numerous painstaking dissections of how "picketing" is defined. Such a discussion is thankfully not warranted here. There is no evidence that the employee picketers at issue here patrolled the doorway, marched in formation, chanted or made noise, created a real or symbolic barrier to the entryways, or otherwise engaged in behavior that disturbed patients or disrupted hospital operations. Indeed, Sergeant Smith testified the employees' behavior was not disruptive, he had no basis for removing them from the property, and he would not have arrested them if requested.

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<sup>&</sup>lt;sup>14</sup> The Respondent contends that GC Exh. 5 shows Arland engaged a patron in the pathway to the door. I note, however, that she and the patron are to the side of the carpet leading to the door.

<sup>&</sup>lt;sup>15</sup> As part of the balancing test that I find does not apply in the instant case, the Respondent points out that the Union planned and orchestrated the picket. The employees, however, carried the signs forming the basis for the complaint before me.

<sup>&</sup>lt;sup>16</sup> I note that the term "picket" and its grammatical variants are used throughout this decision, but this is not meant to denote a hyper-technical definition of the word such as might be required if notice pursuant to Sec. 8(g) or a secondary boycott under Sec. 8(b)(4) was squarely at issue.

The Respondent contends that the requirement to show that the employees have not disrupted business operations begs the question of when the Hospital may assert its property rights. It asserts that it should "not have to engage in an after-the-fact analysis of a trespasser's incremental destruction of an employer's property rights in order to determine whether the employer is legally privileged to enforce those rights." (R Br. 31.) The off-duty employees, however, were not trespassers. This same question, if it pertained to nonemployees, would yield a different result.

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In sum, I find the General Counsel has met its burden to prove the Respondent interfered with protected Section 7 activity by informing the employees that they could not carry picket signs near the mail lobby and pavilion entrances, in violation of Section 8(a)(1).

# B. Alleged Threats

Paragraph 7 of the complaint alleges that the Respondent threatened employees with discipline and arrest, and summoned police to the Hospital.

When determining if statements amount to threats of retaliation, the Board applies the test of "whether a remark can reasonably be interpreted by an employee as a threat." The actual intent of the speaker or the effect on the listener is immaterial. *Smithers Tire*, 308 NLRB 72 (1992); See also *Wyman-Gordon Co. v. NLRB*, 654 F.2d 134, 145 (1st Cir. 1981) (inquiry under Sec. 8(a)(1) is an objective one which examines whether the employer's actions would tend to coerce a reasonable employee). The "threats in question need not be explicit if the language used by the employer or his representative can reasonably by construed as threatening." *NLRB v. Ayer Lar Sanitarium*, 436 F.2d 45, 49 (9th Cir. 1970). The Board considers the totality of the circumstances in assessing the reasonable tendency of an ambiguous statement or a veiled threat to coerce. *KSM Industries*, 336 NLRB 133, 133 (2001).

The parties do not dispute that all interactions between the employees and Hospital management, including the security manager, were cordial and respectful. With regard to the threat of discipline, the parties dispute precisely who said what to whom. Arland recalled Bunting said words which implied to her she could be disciplined. At the very least, it is clear Bunting told Reed discipline could ensue. Reed then conveyed to Arland that the Hospital could hold her accountable for her actions. As to the threats of calling the police, Reed and Zassenhaus both heard Bunting reference calling the police.<sup>17</sup> This made Durfey feel nervous, so he returned to the sidewalk because he "didn't want to get in trouble." (Tr. 190.)

The Board has held that an unlawful threat of discipline communicated to a union representative rather than directly to employees, is the legal equivalent of a threat directed to an employee. See *Schrock Cabinet Co.*, 339 NLRB 182 (2003). Moreover, aside from the threat of discipline conveyed through Reed, Arland felt threatened by Bunting, and it is clear that she was repeatedly asked to leave by security. The threats to call police, which caused Durfey to leave the main lobby entryway area, came to fruition.

<sup>&</sup>lt;sup>17</sup> Though Bunting denies he made threats to actually make the call himself, I am unconcerned with sorting out the semantics in light of what directly ensued.

Based on the foregoing, I find the General Counsel has easily met its burden to prove the Respondent violated Section 8(a)(1) by making threats and summoning law enforcement, as alleged in complaint paragraph 7.

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# CONCLUSIONS OF LAW

1. The Respondent is an employer engaged in commerce and in a business affecting commerce within the meaning of Section 2(6) and (7) of the Act.

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2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

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3. By attempting to prevent employees from publicizing a contract dispute at its nonemergency entrances by carrying picket signs and acting in a non-confrontational manner that did not disturb patients or disrupt hospital operations, threatening employees with discipline for engaging in this activity, summoning the police to the scene, and threatening employees with arrest the Respondent has violated Section 8(a)(1) of the Act.

REMEDY

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Having found that the Respondent has engaged in certain unfair labor practices, I shall order it to cease and desist therefrom and to take certain affirmative action designed to effectuate the policies of the Act.

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Having unlawfully attempted to prevent employees from publicizing a contract dispute at its non-emergency entrances by carrying picket signs and acting in a non-confrontational manner that did not disturb patients or disrupt hospital operations, the Respondent will be ordered to cease and desist from these actions.

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Having unlawfully threatened employees with discipline and arrest for engaging in this activity, and having summoned the police, the Respondent will be ordered to cease and desist from these actions.

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I will order that the employer post a notice in the usual manner, including electronically to the extent mandated in *J. Picini Flooring*, 356 NLRB No. 9, slip op. at 5–6 (2010). Also in accordance with that decision, the question as to whether a particular type of electronic notice is appropriate should be resolved at the compliance stage. Id, slip op. at p. 3. See, e.g., *Teamsters Local 25*, 358 NLRB No. 15 (2012).

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On these findings of fact and conclusions of law and on the entire record, I issue the following recommended<sup>18</sup>

<sup>&</sup>lt;sup>18</sup> If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

## ORDER

Capital Medical Center (the Respondent), Olympia, Washington, its officers, agents, successors, and assigns, shall

## 1. Cease and desist from

- (a) Attempting to prevent employees from publicizing a contract dispute at its nonemergency entrances by carrying picket signs and acting in a non-confrontational manner that does not disturb patients or disrupt hospital operations;
  - (b) Threatening employees with discipline for engaging in such activity;
  - (c) Threatening employees with arrest for engaging in such activity;
  - (d) Summoning police to its facility in response to employees engaging in such activity; and
- 20 (e) In any like or related manner interfering with employee rights under Section 7 of the Act.
  - 2. Take the following affirmative action necessary to effectuate the policies of the Act.
- 25 (a) Within 14 days after service by the Region, post at its hospital in Olympia, Washington, copies of the attached notice marked "Appendix." Copies of the notice, on forms provided by the Regional Director for Region 19, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily 30 posted. In addition to physical posting of paper notices, the notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these 35 proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since May 20, 2013.
- 40 (b) Within 21 days after service by the Region, file with the Regional Director of Region 19 of the Board a sworn certification of a responsible official on a form provided by the Region attesting to the steps that Respondent has taken to comply.

<sup>&</sup>lt;sup>19</sup> If this Order is enforced by a judgment of a United States court of appeals, the words in the notices reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

5	IT IS FURTHER ORDERED that the complaint is dismissed insofar as it alleges violations of the Act not specifically found.			
	Dated, Washington, D.C. July 17, 2014			
10		Eleanor Laws Administrative Law Judge		

#### **APPENDIX**

# NOTICE TO EMPLOYEES POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD

An Agency of the United States Government

## FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union; Choose a representative to bargain with us on your behalf; Act together with other employees for your benefit and protection; Choose not to engage in any of these protected activities.

Accordingly, we give our employees the following assurances:

WE WILL NOT do anything to prevent you from exercising these rights.

**WE WILL NOT** attempt to prevent you from publicizing a contract dispute at its nonemergency entrances by carrying picket signs and acting in a non-confrontational manner that does not disturb patients or disrupt hospital operations.

**WE WILL NOT** threaten you with discipline or arrest, call the police to remove you, or in any other way interfere with you engaging in protected activities, including publicizing a contract dispute at its nonemergency entrances by carrying picket signs and acting in a nonconfrontational manner that does not disturb patients or disrupt hospital operations.

**WE WILL NOT** in any like or related manner interfere with your rights under Section 7 of the Act.

	-	CAPITAL MEDICAL CENTER		
Dated	By			
	•	(Representative)	(Title)	

The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National Labor Relations Act. It conducts secret-ballot elections to determine whether employees want union representation and it investigates and remedies unfair labor practices by employers and unions. To find out more about your rights under the Act and how to file a charge or election petition, you may speak confidentially to any agent with the Board's Regional Office set forth below. You may also obtain information from the Board's website: www.nlrb.gov.

915 2nd Avenue, Room 2948, Seattle, WA 98174-1078 (206) 220-6300, Hours: 8:15 a.m. to 4:45 p.m.

The Administrative Law Judge's decision can be found at www.nlrb.gov/case/19-CA-105724 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1099 14th Street, N.W., Washington, D.C. 20570, or by calling (202) 273-1940.



## THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE

THIS NOTICE MUST REMAIN POSTED FOR 60 CONSECUTIVE DAYS FROM THE DATE OF POSTING AND MUST NOT BE ALTERED, DEFACED, OR COVERED BY ANY OTHER MATERIAL. ANY QUESTIONS CONCERNING THIS NOTICE OR COMPLIANCE WITH ITS PROVISIONS MAY BE DIRECTED TO THE ABOVE REGIONAL OFFICE'S COMPLIANCE OFFICER, (206) 220-6284.